

NELLIE MOCCASIN
v.
ACTING BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-98-A

Decided February 5, 1991

Appeal from a decision affirming the renewal of a right-of-way for a natural gas pipeline across individually owned Indian land.

Reversed.

1. Indians: Lands: Rights-of-Way--Rights-of-Way: Conditions and Limitations--Rights-of-Way: Oil and Gas Pipelines

Under 25 CFR 169.19, the renewal of a right-of-way across individually owned Indian land requires the consent of the owners of a majority of the interests in the land.

2. Indians: Lands: Rights-of-Way--Rights-of-Way: Conditions and Limitations--Rights-of-Way: Oil and Gas Pipelines

The owner of an interest in individually owned Indian land may withdraw his/her consent to a right-of-way at any time prior to the granting of the right-of-way easement by the Bureau of Indian Affairs.

APPEARANCES: Nellie Moccasin, pro se; Richard Whitesell, Billings Area Director, Bureau of Indian Affairs, for appellee; Paul K. Sanders, Esq., Bismarck, North Dakota, for the Williston Basin Interstate Pipeline Company.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Nellie Moccasin appeals from an April 26, 1990, decision of the Acting Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming the renewal of a pipeline right-of-way across Crow allotment No. 1343-A, in which appellant owns a 6/81 interest. For the reasons discussed below, the Board reverses the Area Director's decision.

Background

Williston Basin Interstate Pipeline Company holds a right-of-way for a 12-inch natural gas pipeline across approximately 53 miles of tribal and allotted land within the Crow Reservation. The initial right-of-way was

granted to Williston Basin's corporate predecessor in 1950, renewed in 1970, and approved by the Acting Superintendent, Crow Agency, BIA, on June 17, 1988, for a 20-year renewal term beginning on March 29, 1990.

In preparation for Williston Basin's application for the 1990 renewal, DuBray Land Services, Inc., acting as agent for Williston Basin, undertook to collect consents from the affected landowners. 1/ On September 28, 1987, the owners representing a majority interest in allotment No. 1343-A signed a form consenting to the renewal. The completed consent form stated that compensation was to be in the amount of \$2 per rod "or the appraised fair market value of the rights granted and severance damages as determined by the Superintendent, whichever is greater." Appellant's mother, Lorraine R. B. Moccasin, who held a 27/81 interest in the allotment, signed the form, as did four other owners, each of whom held a 6/81 interest. Appellant and four other owners, each of whom held a 6/81 interest, did not sign. 2/

On October 5, 1987, DuBray Land Services submitted the consents it had obtained, as well as other documents relating to the renewal application, including an appraisal. The appraisal concluded that the compensation for the right-of-way should be \$1 per rod for range/grazing land, \$2 per rod for dry crop land, and \$3 per rod for irrigated crop land. The appraisal was reviewed on November 6, 1987, by the Billings Area Supervisory Appraiser, who found the compensation schedule acceptable. Under this schedule, compensation to the owners of allotment No. 1343-A was set at \$240.

By letter dated April 15, 1988, Lorraine Moccasin notified the Superintendent, Crow Agency, BIA, that she was withdrawing her consent because she did not believe the compensation was sufficient. She also stated that she would like to discuss the matter further. The letter was received by the Superintendent on April 20, 1988, and transmitted to DuBray Land Services on May 2, 1988. There is no record of any action being taken on the matter.

On June 17, 1988, the Superintendent approved a renewed right-of-way easement, covering allotment No. 1343-A and 76 other allotments. Lorraine Moccasin died on December 12, 1988.

On October 12, 1989, appellant visited the Billings Area Office, requesting that BIA void the approved easement because of her mother's withdrawal of consent. 3/ The matter was referred to the Superintendent,

1/ Williston Basin states in this appeal that 1,189 landowners were affected and that the consents of 1,100 landowners were obtained.

2/ The consenting owners were Lorraine Moccasin, Veda Ann Moccasin, Helen C. Moccasin, Loretta C. Moccasin, and Constance F. Moccasin. The non-consenting owners were appellant, Wayne Moccasin, Joyce Moccasin, Harry Olin Moccasin, and Nora L. Moccasin.

3/ Although the Oct. 12 visit to the Area Office is the first contact by appellant noted in the record, it appears that the Superintendent was aware of the issue raised by appellant prior to that date. An Oct. 6, 1989,

who issued a decision on November 8, 1989, reaffirming the right-of-way grant. As a result of some procedural confusion, another decision to the same effect was issued on February 6, 1990, by the agency Program Services Officer. Appellant appealed to the Area Director, contending that, after her mother's withdrawal of consent, there was no longer consent by the owners holding a majority interest in the allotment. The Area Director affirmed the Superintendent's decision on April 26, 1990, holding that the grant of right-of-way was in compliance with the statutory and regulatory authority for such grants. The decision also implied that Lorraine Moccasin was not entitled to withdraw her consent, 7 months after she had granted it, unless she made a showing that the compensation offered by Williston Basin was unfair. 4/

Appellant's appeal from this decision was received by the Board on May 29, 1990. Appellant, the Area Director, and Williston Basin filed statements or briefs.

Discussion and Conclusions

A threshold question here concerns the timeliness of this appeal. Appellant's first contact with BIA concerning the matter appears to have been made over a year after the right-of-way was granted. However, there is nothing in the record to show when or whether appellant was given notice that the right-of-way had been granted. 5/ Under these circumstances, the Board will consider appellant's challenge to the right-of-way grant as having been timely made.

[1, 2] Appellant's only argument before the Board is that the compensation offered by Williston Basin is inadequate. However, before the Area Director, appellant raised the pivotal issue in this appeal, i.e., whether the Superintendent was authorized to approve the right-of-way grant for allotment No. 1343-A after Lorraine Moccasin withdrew her consent. Since

fn. 3 (continued)

memorandum from the Superintendent to the Area Director discusses Lorraine Moccasin's withdrawal of consent but does not state that appellant had inquired about the matter. The Board assumes, however, that appellant may have contacted the agency prior to Oct. 6.

The Oct. 6 memorandum also states: "The subject right-of-way was to be approved excluding Allotment No. 1343-A; however, this allotment was erroneously typed on the grant of easement which involved 72 [sic, should be 76] other allotments."

4/ The Area Director's decision stated at page 4: "[I]t is our decision that unless compensation offered for such a right-of-way is justly unfair and proper justification accompanies the record to support that claim within a reasonable period of time from when consent was given, a waiver of that secured consent could be accepted and given further consideration."

5/ The right-of-way was granted before the present version of the appeal regulations at 25 CFR Part 2 became effective. Under the present regulations, an appellant's right to appeal continues until notice of a decision, together with notice of appeal rights, is given. 25 CFR 2.7.

this issue involves the Department's trust responsibility for appellant's property, the Board will consider it even though appellant failed to pursue the issue before the Board.

25 U.S.C. § 324 (1988) provides in relevant part:

Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

The regulatory provisions implementing this consent requirement are found at 25 CFR 169.3. 6/ 25 CFR 169.19, concerning renewal of right-of-way grants, requires consent in accordance with section 169.3.

6/ 25 CFR 169.3 provides in relevant part:

“(b) Except as provided in paragraph (c) of this section, no right-of-way shall be granted over and across any individually owned lands, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the owner or owners of such lands and the approval of the Secretary.

“(c) The Secretary may issue permission to survey with respect to, and he may grant rights-of-way over and across individually owned lands without the consent of the individual Indian owners when

“(1) The individual owner of the land or of an interest therein is a minor or a person non compos mentis, and the Secretary finds that such grant will cause no substantial injury to the land or the owner, which cannot be adequately compensated for by monetary damages;

“(2) The land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant;

“(3) The whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant;

“(4) The heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary finds that the grant will cause no substantial injury to the land or any owner thereof;

“(5) The owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.”

On September 28, 1987, owners of allotment No. 1343-A with interests totalling 51/81 consented to the grant of right-of-way. There is no question that, had the Superintendent granted the right-of-way on that date, or any time prior to April 15, 1988, the grant would have been valid under the statutory and regulatory authority cited. On April 15, 1988, however, Lorraine Moccasin withdrew her consent; the remaining consenting owners held only 24/81 of the interests in the allotment. This was the situation on June 17, 1988, when the Superintendent granted the right-of-way.

As noted above, the Area Director's decision implied that Lorraine Moccasin had waited too long to withdraw her consent, at least without a showing that compensation was unfair. Williston Basin argues before the Board:

While a "cooling off" period has been recognized for consumers to change their mind on the purchase of certain goods or services, such periods are generally limited to a three day duration, 15 U.S.C. § 1635. See also, 16 C.F.R. § 429.1. Seven months is a totally unreasonable period to allow someone to change their mind. The allowance of a seven month retraction period would have far reaching implications on the completion of right-of-way renewals, other leases, and contract law in general.

(Williston Basin's brief at 7).

The Indian right-of-way statutes and regulations contain no provisions analogous to those cited by Williston Basin. ^{7/} As the Board has stated on a number of occasions, provisions from other areas of the law may not normally be read into the statutes governing Indian lands and resources. This is because, inter alia, the Federal policy governing Indian natural resources incorporates a trust responsibility to manage those resources for the benefit of the Indian owners, as well as an obligation to interpret the statutes to the benefit of the Indians. See, e.g., Mobil Oil Corp. v. Albuquerque Area Director, 18 IBIA 315, 325-26, 97 I.D. 215, 220-21 (1990). In any event, the provisions cited by Williston Basin are inapposite here because they concern consummated transactions; in this case, no consummation occurred until the Superintendent signed the grant of right-of-way.

There being no support for a contrary conclusion, the Board holds that Lorraine Moccasin was entitled to withdraw her consent at any time prior to the time the Superintendent signed the right-of-way document.

Without Lorraine Moccasin's consent, the Superintendent lacked authority on June 17, 1988, to grant a right-of-way for allotment No. 1343-A. Accordingly, the right-of-way document he signed on that date is invalid as it pertains to allotment No. 1343-A.

^{7/} 15 U.S.C. § 1635 (1988) concerns certain consumer credit transactions involving a security interest in the consumer's principal dwelling; 16 CFR 429.1 concerns door-to-door sales. Both allow for rescission of a consummated transaction by the consumer.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Billings Area Director's April 26, 1990, decision is reversed.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge